aml

From: [redacted]@PublicTrust.co.nz>
Sent: Thursday, 2 December 2021 4:25 pm
To: aml
Subject: Review of the AML/CFT Act Consultation Document, October 2021: Public Trust submission
Attachments: Public Trust AML Consultation Submission (final) - 211202.pdf

Dear Sir / Madam,

Please find attached Public Trust's submission on the Review of the AML/CFT Act Consultation Document, October 2021.

Many thanks,

[redacted]
Intermediate Corporate Solicitor [redacted]

Public Trust
Level 4, 7/9 Fanshawe Street, ClearPoint House, Auckland 1010
Toll Free: 0800 371 471
www.publictrust.co.nz

2 December 2021

AML/CFT consultation team
Ministry of Justice
SX 10088
Wellington 6140

By email: aml@justice.govt.nz

REVIEW OF ANTI-MONEY LAUNDERING AND COUNTERING FINANCING OF TERRORISM ACT 2009 (ACT) – SUBMISSION ON CONSULTATION

Introduction

1 Public Trust (**we, us or our**) welcomes the opportunity to submit on the 'Review of the AML/CFT Act Consultation Document' (**Consultation Document**).

2 Public Trust is an independent Crown entity established under the Public Trust Act 2001. We are New Zealand's largest provider of wills and estates administration services, manage over 400 charitable trusts and provide student fee protection services to around 250 private training establishments. In addition, our Corporate Trustee Services currently have more than NZ$90 billion under trusteeship and supervision.

3 This submission engages with a number of questions raised by the Consultation Document and several other potential areas for reform which Public Trust believes should be addressed to improve the AML/CFT regime.

4 These additional potential areas of reforms raised are in keeping with the review's thematic focus of understanding how the AML/CFT Act (and other instruments) have performed and whether they continue to be fit-for-purpose. Overall, we are of the view that the AML/CFT Act and regime should be improved to ensure compliance costs are proportionate to risks of money laundering activities that businesses in specific sectors are exposed to, and unintended consequences are reduced, if not entirely avoided.

5 We welcome any questions the Consultation Team may have with respect to our submissions and views contained in this document.

6 We consent to our submissions being made public.

Summary

7 In summary our main submissions are:

7.1 Public Trust employees – relief from CDD: When Public Trust employees operate accounts for the trusts, estates and agency appointments that Public Trust manages, those employees should not be subject to CDD by the reporting entities providing those accounts. CDD on Public Trust as an entity should be sufficient, on the basis of its status as a statutory trustee company, a Crown Entity and a reporting entity in its own right. Although existing exemptions help in some cases, broader and clearer relief is required.

7.2 Supporting separation of enterprise and personal accounts: Due to system limitations in the implementation of AML/CFT controls by some reporting entities, those systems are

unable to distinguish when an individual is accessing those systems in a personal capacity or in their capacity as a Public Trust employee. This has the undesirable outcome that the individual using their personal login credentials to access those systems also has access to the accounts of trusts, estates and agency appointment that they manage in their capacity as a Public Trust employee. While recognising this is primarily a systems issue with those reporting entities, it would be helpful if the AML/CFT regime supported the delineation of personal and enterprise accounts to incentivise systems changes to resolve this issue.

7.3 Scope of key concepts – 'customer': A number of key AML/CFT concepts are vaguely defined and therefore susceptible to overbroad interpretation. The 'customer' definition is a prime example, leading to unnecessary and inefficient duplication of compliance obligations with no corresponding AML/CFT benefit. Consideration should be given to addressing these problems through more targeted definitions of key concepts. In respect of the 'customer' definition, the principle should be that the reporting entity with the most direct relationship with the customer for a particular account or arrangement is best placed to manage the resulting ML/FT risk and therefore should have the relevant AML/CFT obligations.

7.4 'Wire transfer' rules: Similarly, the 'wire transfer' concept is not clearly defined and there is long-standing and understandable confusion about what transactions it applies to. The wire transfer rules should be focussed on payments that occur through the regular banking payments system. If it is necessary to capture additional transaction types such as remittance payments, these should be prescribed through regulations rather than by overbroad definition.

7.5 Regulatory guidance: The existing regulatory guidance is not always helpful to reporting entities trying to determine how to discharge their AML/CFT obligations. Much of it either restates the law or is equivocal about how obligations are to be discharged (and who decides how to discharge them). This has resulted in the AML Supervisors and reporting entities defaulting to the most conservative position, undermining a true 'risk based approach' to regulation. Consideration should be given to refreshing the regime's approach supplementing the primary legislation and to support a true risk based approach.

7.6 Trusts automatically subject to enhanced CDD: In the New Zealand context, trusts are, by international standards, an unusually common vehicle for the management of personal and family affairs. As such, the use of a family trust should not be automatically considered at high risk of ML/FT and should not automatically trigger enhanced CDD. This is an instance where it is appropriate in the New Zealand context to not adopt the FATF position.

8 These are explained in more detail below where we have also included other, more minor submission, points.

Relief from CDD on Public Trust employees

9 Where Public Trust acts as trustee, executor, administrator, attorney, manager or agent, we operate the accounts maintained for that appointment with the bank of other relevant financial institution (such as stock brokers) through the Public Trust employees assigned to manage that appointment. To ensure continuity of service, a particular appointment is usually covered by a number of Public Trust employees and a particular Public Trust employee may cover a number of appointments.

10 One of the problems we face is that each bank or other financial institution providing an account will typically require CDD on each of those employees as a 'person acting on behalf of' the trust or other arrangement. Our staff are understandably resistant to having their personal identity and address documentation shared with such a large number of third party institutions solely for the purposes of discharging their role within the business. Furthermore, given the number of staff involved, the number of appointments covered and the number of accounts and institutions dealt with, the operational challenges are significant. This large scale sharing of information obviously also poses privacy and employment law risks that we would rather avoid.

11 In our view, it should be sufficient for these institutions to conduct CDD on Public Trust as the entity operating those accounts. It should not be necessary for, and these institutions should not be able to require, CDD on our individual employees. That relief from the 'acting on behalf of' CDD obligation would appropriately reflect Public Trust's somewhat unique features, being all of the following:

11.1 Public Trust Act 2001: in recognition of the special role that trustee companies such as Public Trust hold (including being the only corporates that can act as executor or administrator of deceased estates or hold office as attorney for property under an enduring power of attorney), section 144 of the Public Trust Act 2001 specifically empowers Public Trust to provide certificates that must be accepted as evidence of its right to act in the capacities set out above without the need to provide further evidence[1].

11.2 Crown entity: Public Trust is an autonomous Crown Entity under the Crown Entities Act 2004. As noted in the Consultation Document, Crown Entities are generally less exposed to money laundering or terrorist financing given the governance required under the Crown Entities Act 2004 and the additional checks and reporting requirements under that Act and the Public Finance Act 1989 and the Public Audit Act 2001.

11.3 Reporting entity: Public Trust is itself an AML/CFT reporting entity and, as such, has enhanced internal controls to detect and minimise the risk of ML/FT within its business - including staff identification, vetting and training requirements.

11.4 Simplified CDD: as a licensed statutory supervisor (as well as a Crown Entity, and 'trustee corporation' under the Administration Act 1969) simplified CDD is available in respect of Public Trust under section 18(2)(j) to (l) of the AML/CFT Act.

12 Although existing exemptions help in some limited cases[2], such as deceased estates, the coverage is incomplete and we cannot force counterparty reporting entities to use an exemption even if it is available to them. For the reasons set out above, broader and clearer relief from CDD obligations on Public Trust employees is warranted in this regard.

Existing exemptions - retention and extension

13 Public Trust has the benefit of a number of specific exemptions, and relies on a number of general exemptions, for its low risk appointments. By way of example, these include:

[1] We note similar privileges are granted to the other statutory trustee companies under the Trustee Companies Act 1967.

[2] Part 2 of the Schedule to the Anti-Money Laundering and Countering Financing of Terrorism (Class Exemptions) Notice 2018 (**Class Exemptions Notice**) and regulations 24AD and 24AE of the Anti-Money Laundering and Countering Financing of Terrorism (Exemptions) Regulations 2011 (**Exemption Regulations**)

13.1 acting as property manager under the Protection of Personal and Property Rights Act 1988 (to manage the assets of an individual who has lost mental capacity)[3];

13.2 acting as executor or administrator of a deceased estate[4];

13.3 acting as statutory supervisor of retirement villages, in respect of its protective role of holding deposits for intending retirement village residents[5].

14 These exemptions recognise the low risk nature of these appointments and should be continued. However, practical issues with these exemptions remain:

14.1 Although these exemptions relieve us from some AML obligations in respect of these appointments, they do not always extend corresponding relief to the reporting entities we need to deal with (e.g. banks, real estate agents and other reporting entities) to discharge our role;

14.2 Even in the case of deceased estates exemption, where relief is extended to those other reporting entities[6], we cannot compel that reporting entity to rely on the exemption and many times they choose not to or have not updated their internal processes to account for Public Trust's unique position

14.3 Therefore, despite the exemptions existing, the benefit is not properly realised because we often still need to facilitate the discharge of AML procedures for those counterparties;

14.4 This is compounded by the fact that many of these appointments are trusts or trust-like and under current AML regulatory settings/guidance, trusts are automatically treated as high risk (we comment on this issue separately from paragraph 29 below).

15 To resolve these issues, these exemptions should be extended such that any counterparties we deal with have the benefit of the same relief as us, and phrased in such a way that the counterparty cannot require us to facilitate discharge of AML processes from which they have become exempt.

Facilitating the separation of enterprise and personal accounts

16 Some of the major banks that Public Trust deal with have difficulty distinguishing between the different capacities in which an individual may electronically access accounts. We understand this is due to limitations caused by the implementation of AML/CFT controls within their businesses.

17 The result of these systems limitations is that those individuals, when using their personal internet banking logins at certain banks, can also view and access the accounts of the trust, estate and agency clients they manage as employees of Public Trust (where those accounts are held with the same bank). This situation is obviously undesirable from both a client privacy and financial risk perspective.

18 We try to manage these risks as best we can with internal business rules but ultimately the weakness is a systems issue outside our control. To address this, it would be helpful if the AML/CFT regime supported a delineation between the 'enterprise' and 'personal' capacities in which an

[3] Clause 2(a)(ii) of Part 2 of the Schedule to the Class Exemptions Notice
[4] Regulation 24AD of the Exemption Regulations
[5] Part 12 of the Schedule to the Class Exemptions Notice
[6] Clause 24AE of the Exemption Regulations

individual may operate an account with a financial institution. This could incentivise such service providers to implement this in their internal systems and more robustly resolve this issue.

Scope of key concepts e.g. 'customer'

19 A number of key AML/CFT concepts are vaguely defined and therefore susceptible to overbroad interpretation. This leads to unnecessary and inefficient duplication of compliance obligations across the system with no corresponding AML/CFT benefit.

20 The 'customer' definition is a prime example of this. It includes any person with whom reporting entity has a business, professional or commercial relationship that has or is expected to have an element of duration. In our experience, the AML Supervisors (and therefore their supervised reporting entities) have taken a conservative approach to this definition. This has resulted in:

20.1 Customer relationships being treated as existing even where the reporting entity has no direct dealings with the purported customer and the relationship has a purely academic or tenuous basis. This can make compliance with basic AML/CFT obligations such as customer due diligence and suspicious activity reporting impracticable, if not impossible.

20.2 A number of reporting entities having customer relationships with the same person in respect of the same arrangement, which leads to unnecessary and inefficient duplication.

20.3 This duplication continuing to exist despite there being one reporting entity who clearly has the closest and deepest relationship with the customer and who is therefore best placed to manage the ML/FT risks of that arrangement.

21 There is some existing recognition of this problem in the regime. For example through the mechanisms of reliance[7], agency[8] and the managing intermediaries class exemptions[9]. However, these are incomplete as they are restricted to CDD and do not address other AML/CFT obligations. There are also other limitations and practical issues - e.g. the managing intermediaries exemption is unnecessarily complex and does not allow reliance on reporting entities that are not financial institutions. The problems with the ministerial exemption process that might otherwise be used to address this are canvassed in the Consultation Document.

22 We suggest that urgent consideration needs to be given to addressing these problems through more targeted definitions of key concepts, including that of 'customer'. In our view, the principle should be that the reporting entity with the most direct relationship with the customer in respect of a particular account or arrangement is best placed to manage the resulting ML/FT risk and should therefore have the only AML/CFT obligations for that account or arrangement.

Scope of 'wire transfer' rules

23 A related issue is the scope of the wire transfer rules. The 'wire transfer' concept is not clearly defined and there is long-standing and understandable confusion, including amongst the AML Supervisors, about what transactions it applies to. As with the customer definition, this has resulted in uncertainty about whether and when elements of transactions conducted by non-bank reporting entities fall within scope.

[7] Section 33 of the AML/CFT Act
[8] Section 34 of the AML/CFT Act
[9] Parts 5 and 6 of the

24 In our view, the wire transfer rules should be restricted to payments that occur through the regular banking payments system. If it is necessary to capture additional transaction types such as remittance payments, these should be prescribed through regulations and not automatically captured.

Regulatory guidance

25 The existing suite of regulatory guidance is not always helpful to reporting entities trying to determine what their obligations are. Much of the guidance simply restates the law or is equivocal and does not provide firm direction on what a reporting entity should or should not do, or should or should not consider, or how much discretion the reporting entity can safely exercise.

26 This has led to AML Supervisors and their regulated reporting entities defaulting to the most conservative position out of an abundance of caution. In addition to confusing (rather than clarifying) the law, this undermines the 'risk based approach' intended by the Act and diverts energy away from the task of intelligently designing risk-based controls to detect and deter ML/FT and into conservative box-ticking.

27 There would be merit in reconsidering the nature of supervisory guidance and how it is formulated. For example:

27.1 there is a highly prescriptive 'identity verification code of practice' that imposes a semi-mandatory one-size-fits-all set of legal requirements for identity verification (an area that one would have thought should be at the heart of risk based approach);

27.2 the 'countries assessment guideline' requires a qualitative assessment by each reporting entity of e.g. whether a country has sufficient or insufficient AML/CFT systems/measures (a binary test that would more naturally lend itself to a prescribed set of countries, for both consistency and efficiency); and

27.3 as stated above, guidance documents are overly prescriptive in some circumstances (where a risk based approach would be more appropriate), though in others circumstances lacking detail where it would be appreciated (for example, in respect to the definition of customer). The guidelines have also not kept at pace with regulatory amendments, meaning that in some circumstances, entities are not aware of legislative change and have difficulty in applying it confidently (for example, in respect to July 2021 changes which changed the CDD requirements for executors of estates that are also reporting entities).

28 We would therefore suggest that:

28.1 active consideration is given to the level of prescription that is desirable in any proposed guidance. In general, a risk based approach should be favoured;

28.2 the regulated population is consulted on any guidance prior to it being formally issued or subsequently amended; and

28.3 where the risk based approach is provided for, the scope and limits of the discretion under that risk based approach (if any) should be stated.

Trusts not automatically subject to enhanced CDD

29 In New Zealand, compared to other common law jurisdictions, trusts appear to be an unusually common vehicle for the management of personal and family affairs[10]. They are used for a broad range of legitimate reasons including estate planning and asset protection. However, despite no obvious or inherently high ML/FT risk, they are automatically subjected to enhanced CDD. This appears to be on a conservative implementation of the Interpretative Note to FATF Recommendation 10 (Customer Due Diligence).

30 The AML/CFT Act records its purposes as being to adopt the FATF Recommendations *where appropriate in the New Zealand context*[11]. Given the particular New Zealand preference for the use of trust structures to manage personal and family affairs, and in the absence of any evidence of a trend for the use of trust structure for ML/FT purposes, we suggest it would be appropriate for family trusts to no longer be automatically subjected to enhanced CDD and, by implication, be treated as being higher risk.

Licensing and registration

31 The Consultation document suggests that there should be a new (or replaced) registration regime for AML/CFT reporting entities and a 'risk based' licensing regime used only for 'high risk' reporting entities (such as money-remitters)[12]. A prospective AML/CFT specific licensing regime would require some form of cost recovery, payable by businesses when applying for or renewing their licence.

32 With respect to licensing, there are already a series of licensing or quasi-licensing frameworks across the AML regulated population – such as for financial services, lawyers and conveyancers, auditors, chartered accountants and real estate agents. We would therefore resist another licensing framework that would add further complexity to an already complicated regulatory landscape. However, if a further AML licensing requirement were introduced, it is important that its scope be clear and truly limited to 'high risk' entities. Public Trust is low risk and so should not be subject to any new licensing requirement.

33 We would make a similar point in relation to registration. Most AML reporting entities are already subject to some kind of registration obligation (such as the registration requirements under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (FSPA)). Interactions with existing registration requirements should be carefully considered to maximise alignment and minimise duplication. For example, if separate AML registration were implemented, the FSPA and AML regimes should be de-coupled and the AML purposes of the FSPA excised.

Sanctions for employees, directors, and senior management

34 The Consultation Document has requested submissions on broadening the scope of civil sanctions to include directors, senior managers and compliance officers[13]. This would mean directors, senior managers and AML/CFT compliance officers could be subject to personal liability.

35 In our view, the extension of the penalties regime to directors and individual staff members is not necessary or appropriate in the New Zealand context. Directors and staff members involved in compliance roles are already strongly incentivised by organisational, reputational and market settings to facilitate compliance with the AML regime and to promote a culture which supports that.

[10] Paragraphs 1.13 to 1.17 of the Law Commission's Review of Trust Law in New Zealand: Introductory Issues Paper (November 2010)
[11] Section 3(1)(b) of the AML/CFT Act
[12] Questions 1.52-1.64.
[13] Questions 3.25-3.27.

In egregious cases, indirect recourse against responsible individuals already exists through accessorial liability or other legal pathways (as was demonstrated in the *Ping An* series of cases).

Address verification of customers who are natural persons

36 As noted in the Consultation Document[14], many countries do not require address information to be verified, the existing NZ rules go beyond the FATF standards and current processes for verifying addresses are not robust (a customer may easily change their address with a financial institution and that address will be not re-verified by the financial institution providing a proof of address document).

37 The address verification requirements should be brought in line with standard international practice and FATF rules.

Yours sincerely

Chief Executive
Public Trust

[14] Questions 4.50-4.52.